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No. 85-698

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EL CID, LTD.,

Petitioner,

vs.

THE NEW JERSEY ZINC COMPANY, GULF & WESTERN INDUSTRIES, INC., GULF & WESTERN INTERNATIONAL HOLDING COMPANY, GULF & WESTERN (CANADA) LIMITED, WATTS, GRIFFIS & MC OUAT LIMITED, CAMINO GOLD MINES LIMITED, CONDOR MINING, INC., RICHARD W. HOGELAND, and DAVID M. KOOGLER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Antitrust Questions

1. Under the doctrine of this Court that the Sherman Act protects competition not competitors, do acts that foreclose all competitors injure competition?

2. Does predatory conduct intended to exclude all competitiors from a flow of commerce and to usurp that flow for the benefit of the predators have an effect on competition under the Sherman Act?

3. Does a discrete source of a valuable commodity constitute a geographic "market" within Section 1 of the Sherman Act?

4. When defendants use unfair means to foreclose all competitors, United States and foreign, from access to a very valuable foreign source of gold, does such conduct have the more-than-*de minimis* impact on commerce necessary for application of the Sherman Act?

The published opinion of the District Court answers these four questions in the negative. The unpublished opinion of the Court of Appeals does not address them. Other federal courts have answered them in the affirmative.

5. Mere bigness not being an offense under the Sherman Act, does mere smallness bar one from recovering under that Act?

6. Does the completeness of defendants' predatory success insulate them from liability to a victim of their unlawful acts?

Both courts below answered both these questions in the affirmative. This Court and other federal courts have answered No. 6 in the negative. We do not find that No. 5 has previously been addressed.

Choice of Law Questions

7. Once a federal court recites correctly the applicable principles of state law, is it then free to ignore those principles or stand them on their head in applying them to the facts?

8. When New York chooses the law of the place having the most significant relationship with the subject matter of the alleged torts, and when the federal court sets out a neat little table of facts that show on their face that the most significant relationship is with A not B, is the federal court nevertheless free to hold that the most significant relationship is with B not A?

9. In determining what place has the most significant relationship with a successfully consummated conspiracy, should the court sever and disregard the situs of the "activities that spawned the alleged conspiracy" on the ground that "a plot ... in and of itself is not actionable"?

The District Court effectively answered these three questions in the affirmative. (The words quoted in No. 9 appear in its opinion herein, 575 F.Supp. 1513 at 1517.) The Court of Appeals affirmation was without opinion on these questions. Generally accepted principles require these questions to be answered in the negative; this Court has effectively answered No. 9 in the negative.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
Table of Contents	iii
Table of Authorities	v
Citations to the Opinions Below	1
Jurisdiction	1
Statutes Involved	1
Statement of the Case	2
REASONS FOR GRANTING THE WRIT	8
Point 1 The Published Holding on Anti-Competitive Effect Clashes with Sherman Act Decisions of This and Other Courts	9
a. Protection of Competition versus Protection of Competitors	9
b. This Court Should Resolve the Conflict between This Decision and the Fifth Circuit on Definition of Geographic Market	11
c. The Courts Below Have Rewarded Defendants in Their Success in Crushing Competition, Tipping the Balance against the Victim and in favor of the Predators Contrary to the Dictates of This Court and the Purposes of the Sherman Act	12

Page

Point 2 Important Choice of Law Issues Warrant Resolution. 14

CONCLUSION 16

TABLE OF AUTHORITIES

Cases	Page
Brown Shoe Co. v. United States, 370 U.S. 294 (1962)	10,11
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)	9-11
Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962)	15
Industrial Investment Development Corp. v. Mitsui & Co., Ltd. 671 F.2d 876 (5th Cir. 1982), *vacated and remanded for further consideration*, 103 S. Ct. 1244 (1983), 704 F.2d 785 (1983), *cert denied*, 104 S. Ct. 393 (1983)	11-12
Nader v. General Motors Corp., 25 N.Y.2d 560, 307 N.Y.S.2d 647 (1970)	14
Neuman v. Vidal, 710 F.2d 856 (D.C. Cir. 1983)	13
Oreck Corp. v. Whirlpool Corp., 579 F.2 126 (2d Cir. 1978), *cert denied*, 439 U.S. (1978)	11
O'Rourke v. Eastern Airlines, Inc., 730 F.2d 842 (2d. Cir. 1984)	15
United States v. United Shoe Machinery Co., 247 U.S. 32 (1918)	
Statutes and Other Authorities	
Clayton Act §4	2,10
Sherman Act	i,3,9-12, 14
Sherman Act §1	i,1,2,11-12

	Page
28 U.S.C. § 1254(1)	1
28 U.S C. § 1332	2
28 U.S.C. § 1337	2
New York Times	13
Shepards Citations	9
Wall Street Journal	13

Citations to the Opinions Below

The memoranda and orders of the District Court are reported at 551 F.Supp. 626 (S.D.N.Y. 1982) (being included as Appendix B hereto*); 575 F.Supp. 1513 (S.D.N.Y. 1983); and 588 F.Supp. 125 (S.D.N.Y. 1984). The orders of the Court of Appeals (being included as Appendix A hereto) are unreported.

Jurisdiction

The order of the Court of Appeals for the Second Circuit affirming the judgment of the District Court was entered on June 11, 1985, and the order denying petitioner's petition for rehearing was entered on July 23, 1985. This petition for a writ of certiorari is being filed within 90 days of the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Statutes Involved

Section 1 of the Sherman Act, 15 U.S.C. §1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

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* Appendices A and B hereto are cited, respectively, "A-" and "B-" and page number. The Joint Appendix filed with the appeal to the Court of Appeals is cited "JA-" and page number.

Section 4 of the Clayton Act, 15 U.S.C. §15, provided in 1976, when this action was commenced:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

(Section 4 was amended in 1980 and 1982.)

Statement of the Case

The complaint was filed in the United States District Court of the Southern District of New York in March 1976 charging (i) a conspiracy in unreasonable restraint of trade under Section 1 of the Sherman Act, as well as the intentional torts of (ii) interference with advantageous contractual, pre-contractual and business relationships, and (iii) conspiracy, under the common law of New York. The District Court had original jurisdiction under Section 4 of the Clayton Act and 28 U.S.C. §1337. Federal jurisdiction over the common law claims was based on diversity principles as well as pendant jurisdiction, 28 U.S.C. §1332.

In September 1981, after extensive discovery and motion practice and virtually on the eve of trial, the so-called Gulf & Western ("G&W") defendants* commenced a serial motion that resulted in summary judgment of dismissal in July 1984. Along the way the District Court issued the above cited memoranda an orders as follows:

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* Being Gulf & Western Industries, Inc. of New York; The New Jersey Zinc Company, being a *division* of G&W, Inc.; Gulf & Western International Holding Company and Gulf & Western (Canada) Limited, both being subsidiaries of G&W, Inc.; and Richard W. Hogeland and David M. Koogler, both being officers of G&W, Inc.'s New Jersey division.

In 1982 the court dismissed the Sherman Act claim of plaintiff ("El Cid"). In 1983 it held that the law of Bolivia rather than New York governed the tort claims. In 1984 it held that even if all that El Cid alleged was true, it was not entitled to relief under Bolivian law.

The facts material to the consideration of the questions presented, as shown in the memoranda and orders of the District Court and the record in the Court of Appeals, are as follows:

In 1975 El Cid was a small company located in Costa Rica, incorporated in the Cayman Islands, B.W.I., engaged in mining and timber projects in Latin America, and providing ancillary services in the United States. Two American citizens, Thomas W. Gilkey and Richard L. Bell, constituted its officers, directors and shareholders. Gilkey, its prinicpal, had been engaged in mining and timber projects in Latin America for some twenty years. JA-68, 118-19, 123, 131, 162, 253.

S.J. Groves and Sons Company ("Groves") was a large construction, earth-moving, and strip mining (i.e., similar to placer mining) concern in Minneapolis, Minnesota. Early in 1975 Groves became interested in branching out into mining in Latin America.

The Tipuani Valley of Bolivia, located about 65 miles north of La Paz, is rich in gold. A report circulated among G&W's top management in New York, for example concluded:

> The reserves under consideration in Tipuani will rank among the very richest placer mining ground known to be in existence in modern history.... The Tipuani valley is probably the world's largest reserves of mineable grade.

JA-179-181, 412-13. The portion of the Tipuani Valley area in which the gold is most heavily concentrated is 855 acres known as the Bolgol Concessions ("Bolgol"). JA-182-183, 233.

In March 1974 certain predecessors of El Cid (both being referred to collectively as "El Cid") entered agreements in Florida and Canada with one Helmut Gaensel to purchase his rights to the

Bolgol. Gaensel was then in litigation in the Bolivian courts against defendant Condor Mining, Inc. ("Condor") of New York City over those rights. Condor belonged to a joint venture to exploit the Tipuani gold with all of the other corporate defendants. G&W financed and controlled that joint venture, and the conspiracy that evolved to further it, directly from New York City and, in day-to-day operations, often through their New Jersey Zinc division in Bethlehem, Pennsylvania. Defendant Hogeland, who headed G&W's New Jersey Zinc division, reported to David N. Judelson, G&W's President in New York.* G&W spent some $2,275,000 to further the venture and the conspiracy.

El Cid, oblivious of all this, made preparations to mine the Bolgol if Gaensel won the suit against Condor. Since it was then short of liquid assets, it too sought joint venturers. The principal prospective partner was Groves. Groves sent representatives to La Paz and the Bolgol with El Cid in April and May 1975, after which Groves offered El Cid a "70-30" partnership to work the Bolgol; but El Cid held out for "60-40", with Groves still as senior partner, to which James Walker, the Groves project manager, agreed, subject to certain further conditions. El Cid also lined up a Denver, Colorado businessman named William A. Kilpatrick as a back-up partner on a "50-50" basis. Groves was prepared to invest $3,500,000 to mine the Bolgol; Kilpatrick was prepared to start on a much smaller scale with $350,000 and pay for expansion with gold produced. JA-408-09, 222-23.

El Cid made detailed plans for the front end loaders, tractors, washing plant, dragline and other equipment needed to start mining, and was prepared with Groves to hire additional expertise as needed. JA-74-75. El Cid planned to bring most of the Bolivian gold and/or its proceeds to the United States; and of course Groves or Kilpatrick, who are located here, would do the

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* While G&W is headquartered in New York City, G&W employees directed much of the day-to-day operations of Bolivian gold project through G&W offices in Pennsylvania. The District Court for choice-of-law purposes, chose to ignore the Pennsylvania situs of these G&W employees and focused on New York, the paw in Pennsylvania still being part of the cat in New York.

same. JA-170-71. In the opinion of Clinton L. Miller, El Cid's mining expert, El Cid's preparations starting with either Groves or Kilpatrick passed the test of feasibility to mine the Bolgol for at least twenty years. JA-226-28.

On May 19, 1975, Gaensel won the Bolgol by a final and non-appealable judgment of the Bolivian court, producing "amaze[ment]," "upset," and "general shock" at G&W (JA-414-15), in view of the fact that defendants had sought strenuously to influence the panel of judges while the case was *sub judice*. Defendants' documents show, for example, that three of their agents "know most of the judges concerned on a personal basis, and will have discussion with them at the appropriate time." JA-184-86. Another local agent had telexed G&W on March 5, 1975, JA-188 (see JA-184-91, 194-97,232):

> COURT MEMBER WHO WILL PROTECT THE DECISION IS GOOD FRIEND OF MINE AND IS RELATIVELY UNDER CONTROL. WE HAVE REQUESTED COLLABORATION TO ANOTHER ATTORNEY WHO HAS DEFINITE INFLUENCE ON COURT JEDGE. WE ARE WORKING HARD ON THE CASE.

Defendants, having lost the Bolgol to Gaensel in spite of such efforts, promptly launched a three-pronged attack from New York City to protect the G&W investment and recapture the Bolgol. JA-415. Their documents show that "Plan One" was "to have the property revert to the State and [defendants] be awarded the right to work it under a long term lease," through secretly obtained legislation that would effectively expropriate the rights to the Bolgol. "Plan Two," defendants admitted, was "really only a delaying action" to keep the Bolgol "TIED UP IN LITIGATION" through a suit filed in which "there is no hope of winning it" and the filing of additional "phony lawsuits." JA-192-96-204-05, 415-16, 433.

Third, defendants, well knowning of El Cid's rights to the Bolgol through Gaensel, worked on Gaensel through a week of negotiations in New York City to try to induce him to sell those

same rights to them. Gaensel, however, went instead to Costa Rica and June 25 entered a new agreement with El Cid which superceded his agreements with El Cid of the previous year; it called for El Cid to pay him approximately $1,000,000 (U.S.), with the first payment by El Cid to Gaensel due on July 25, 1975. JA-417-22,142-44. El Cid was at that point dependent on Groves to make the $25,000 payment due to Gaensel on July25 and also to pay the $20,000 it would take to register its new June 25 agreement and perfect its rights to the Bolgol in Bolivia.

Groves sent a project manager, James Walker, and its General Counsel, Robert A. Engelke, Esq., to Bolivia to determine whether to go forward in joint venture with El Cid. Engelke testified on deposition that Groves fully intended to do so if possible, to register the June 25 agreement, and to pay Gaensel the $25,000. Ja-211-14,423.

Defendants, however, embarked on a campaign of intimidation and obfuscation against Groves in Florida and in La Paz. Defendants agents repeatedly told the Groves representatives how G&W were big and determined, had connections in the Bolivian government, and would keep the Bolgol tied up in unending litigation if Groves went forward with El Cid. JA-198, 424-29. It worked. Walker and Engelke finally told El Cid that Groves was "not buying a legal battle ... a can of worms." JA-431. Engelke testified that the legal problems raised by defendants, including the threats and two Plan Two suits that were actually filed, were "the principal reason" why Groves left El Cid. JA-429.

The coup de grace came when a Bolivian lawyer named Augusto Gottret, who, unbeknownst to Engelke or Walker, was actually on defendants' payroll to recapture the Bolgol (JA-195-97), came "out of the woodwork," disparaged Groves' involvement with El Cid, and offered Groves an alternative mining venture. Groves did in fact go forward with that mining venture in Bolivia. JA-206-10, 216, 424-32.

Defendants' United States employees, Hogeland, Koogler, and Ira P. Barsky, Esq., of G&W, Col. V.D. Luehring of Condor, and

their local agents were, from July 13 on, subjecting Gilkey in La Paz to a relentless series of threats, as defendants have partially admitted. JA-432-36. For example, G&W's Koogler told Gilkey, according to Gilkey's testimony, JA-433 (see also 434-35):

> "We are going to have the property. We will harass you. We will sue you. We wil file phony lawsuits. We will do anything within our power to keep you from operating that property. We will discuss this and talk to any partners you may come up with. We will discourage them and we will assure them that they are fighting an unending legal battle."

G&W's Barsky told Gilkey, JA-435:

> "We believe that there are other people like you who have purchased the rights to this property from Mr. Gaensel and there may be as many as ten people." I remember him using that term, "There may be as many as ten people that are going to come out of the grass and we are going to just have to mow everybody down as they appear. We fully intend to do so. . . ."

When Groves told Gilkey they were not going forward with El Cid, Gilkey summoned Kilpatrick, who flew from Denver to La Paz with $52,000 (U.S.) cash in his briefcase, and was himself subjected to defendants' threats and enticements. Kilpatrick did not make the $25,000 payment or register El Cid's June 25 agreement for the Bolgol. This happened in substantial part because Gilkey of El Cid had sought legal advice on those subjects from a Bolivian lawyer named Luis Fernando Valle, in view of the new clouds that defendants had put on the title to the Bolgol. Valle advised Gilkey not to make the payment or register the Agreement, but rather to send Gaensel a "Notarial Letter" saying that the payment would be made when Gaensel removed the clouds from the title. This was bad advice. Unbeknownst to Gilkey or Kilpatrick, Valle, too, was an agent on the G&W payroll, was referred to in many of defendants' telexes as "the expediter", and was defendants' chief agent to effectuate Plan One. Broke and

defeated, Gilkey returned to Costa Rica. JA-217, 416, 436-41. G&W's president, Judelson, was advised in New York on July 30 that defendants were about to sign a new agreement with Gaensel to acquire the Bolgol and required $175,000 from G&W's New York account.

Defendants agreed among themselves to "tie up" and "to assemble as much property as possible, all the way up and down the [Tipuani] river," since if "G&W were going to be involved at all, they wanted to be involved in a big way." JA-233-35. (During and after El Cid's challenge, defendants were seeking $7,000,000 in additional financing in New York from largely New York banks, repayable in Tipuani gold. JA-169-73, 442.) Yet the defendants fell out among themselves and failed to mine the riches of the Bolgol, which, we understand, others are mining very profitably today. JA-442.

REASONS FOR GRANTING THE WRIT

The District Court stated at the outset of its 1982 decision dismissing El Cid's antitrust claim that it

> accept[ed] as established that defendants did indeed use unfair means to deprive plaintiff of the Bolgol Concessions and that the alleged conspiracy among defendants was planned and set in motion in the United States. B-3.

Similarly the Court of Appeals affirmed the dismissal of the antitrust claim" [e]ven if ... defendants' actions unlawfully impaired El Cid's ability to obtain the major financing needed for the contemplated purchase [of the Bolgol]." A-2. But both courts held as a matter of law that defendants need not submit their very possibly "unfair" and "unlawful" conduct ot a trier of fact.

The Court of Appeals directed that its reasoning "shall not be reported, cited or otherwise used" (A-4), so that it will be without effect except upon the victim of the unfair and unlawful conduct. But the District Court, we submit, made bad law that is available to confuse, mislead, and damage one and all. (In the

complex and paradoxical field of antitrust, careful judges, law clerks, and practitioners may be counted upon to couple the facts in the antitrust decision, 551 F. Supp. 626, with the facts in the choice of law decision, 575 F. Supp. 1513, and if they follow this case, reach wrong results.) A review of Shepard's Citations indicates that this may not yet have happened, but we respectfully submit that it would be for the best for this Court to correct these errors and clarify the law before harm befalls.

Point I

The Published Holding on Anti-Competitive Effect Clashes with Sherman Act Decisions of This and Other Courts.

a. *Protection of Competition versus Protection of Competitors.*

The District Court stated, at B-7:

> As to the gold mining industry, plaintiff claims that defendants' predatory conduct has barred all in that industry from a competitive chance at the Bolgol - the key concession in the gold-rich Tipuani Valley.

Supporting plaintiff's claims are defendants' admissions, recited in the Statement of the Case, above, about Plan One to swipe the property through legislation, Plan Two to tie it up in baseless litigation, etc., plus "going to just have to mow everybody down as they appear" and agreeing to "tie up" and "to assemble as much property as possible, all the way up and down the [Tipuani] river." By their nature and effect, these acts are not aimed at one competitor alone. They are calculated to destroy all competition, and to create conditions in which competition cannot exist.

The court continued, at B-9-10:

> . . . plaintiff — in urging us to consider the effect of the alleged conspiracy on the gold mining industry in the Tipuani Valley — would have us focus on the effect on *competitors* rather than on competition. It is

> abundantly clear, however, that the Sherman Act protects competition not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* (1977) 429 U.S. 477, 488, 97 S. Ct. 690, 697, 50 L.Ed.2d 701 . . . .

What this Court said in the cited passage in *Brunswick* was:

> The antitrust laws, however, were enacted for "the protection or *competition* not *competitors*." *Brown Shoe Co v. United States*, 370 U.S. at 320, 82 S. Ct. at 1521....

We respectfully submit that that statement, taken out of context as it often is, is ambiguous and confusing; that the District Court herein succumbed to the ambiguity and confusion; that it is important for this Court to clear this up; and that this is an excellent opportunity to do so.

Competition does not exist in a vacuum. It exists in a context of real and potential competitors in a geographic and porduct market, or it does not exist at all. Acts that reduce or foreclose competition in a market may *ipso facto* injure competitors, any one or more of whom are entitled to seek redress under Section 4 of the Clayton Act, as El Cid did and Groves and Kilpatrick did not in the present case. But if the statement in *Brunswick* that the antitrust laws protect competition not competitors is read literally, then it repeals Section 4; but of course *Brunswick* does not repeal Section 4.

We understand the *Brunswick* statement to mean that the antitrust laws protect individual competitors from acts, and only from acts, that also impair competition. But acts that may totally destory an individual competitor are not actionable under the antitrust laws unless the very subtraction of that competitor from that market hurts competition in that market. We never claimed that the subtraction of El Cid from the Tipuani gold market would have impaired competition in and for that market: If defendants had fire-bombed El Cid's headquarters, we would not have sued under the Sherman Act. But because in foreclosing everybody, defendants also foreclosed El Cid, El Cid's claim

meets the standards of Sherman Act Section 1 and Clayton Act Section 4.

Some courts have soundly followed this Court's statement in *Brunswick* when one competitor is affected by defendants' acts and competition is not. E.g., *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 134 (2d Cir. 1978), *cert denied*, 439 U.S. 946 (1978). The District Court in this case did not, and here and the Second Circuit did nothing about it. The ambiguity of the often quoted *Brunswick* language should be apparent upon consideration, but evidently it is not always. We respectfully ask this Court authoritatively to clarify it.

b. *This Court Should Resolve the Conflict between This Decision and the Fifth Circuit on Definition of Geographic Market.*

Even though the District Court recognized El Cid's claim that "defendants' predatory conduct has barred all in [the gold mining] industry from a competitive chance at the Bolgol" (B-7) (we also said that its objective was to foreclose the entire Tipuani Valley), the court went on to assert El Cid's "failure to define the relevant geographic market" (B-9); but then it went back to saying that El Cid was "urging us to consider the effect of the alleged conspiracy on the gold mining industry in the Tipuani Valley." B-9. (We had in fact given the court considerable evidence that considering the Tipuani Valley a discrete geographic market of effective competition accorded with geologic and commercial realities. *Brown Shoe Co. v. United States*, 370 U.S. 294, 336 (1962).)

Where someone buys or sells a commodity may be what most laymen consider a "market." But it also accords with commercial realities of effective competition and with the purposes of the Sherman Act to add a source of supply to what may constitute a "market" within the ambit of the Act. The reported decision below refuses to do this. It thus clashes with the Fifth Circuit in *Industrial Investment Development Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876 (5th Cir. 1982), *vacated and remanded*

for further consideration, 103 S. Ct. 1244 (1983), 704 F.2d 785 (1983), *cert denied*, 104 S. Ct. 393 (1983).

In *Mitsui* the geographic market was Borneo, and the restraint was achieved by underhanded competition for a single source of the product, there timber as here gold. Plaintiffs there alleged that defendants kept them out of the timber business in Borneo by destroying their contractual rights to a timber concession. 671 F.2d at 881. The Fifth Circuit held, at 883:

> There was ample evidence in the record to show that Mitsui-U.S.A. had appropriated much of the business that plaintiff's claim they would have derived from the forestry concession . . .

While the court in *Mitsui* did not pass on the effect on competition in that market because plaintiffs had not been on notice to present their proof (at 880 n. 16), the point here is that the Fifth Circuit could and would have dismissed on the pleadings if those pleadings had been insufficient as to market effect. *Mitsui* thus stands for the proposition that a conspiracy that deprives a competitor of a government concession that is a source of supply in a foreign nation violates the Sherman Act, which is precisely the opposite of the holding here.

The definition of "market," particularly under Section 1 of the Sherman Act, needs further amplification. The clash between the decision below and the Fifth Circuit in *Mitsui* illustrates the need.

c. *The Courts Below Have Rewarded Defendants for Their Success in Crusing Competition, Tipping the Balance against the Victim and in favor of the Predators Contrary to the Dictates of this Court and the Purposes of the Sherman Act.*

The District Court stated, on the issue of whether foreign or interstate commerce was affected by defendants' acts, at B-6:

> The startling thing about the facts and arguments submitted by plaintiff is that . . . there is no suggestion

> that plaintiff, its president, or its predecessors had ever sold an ounce of gold or any other metal in the United States or had made any specific plans to do so.

But this Court made it clear over 60 years ago that there is no requirement whatsoever that El Cid had ever sold an ounce of gold, when it said in *United States v. United Shoe Machinery Co.*, 247 U.S. 32, 53 (1918):

> [N]either the letter of the law nor its purpose distinguishes between strangling of commerce which has been born and preventing the birth of commerce which does not exist.

(As to specific plans to sell gold here, it is judicially noticeable, as we noted below, that the *Wall Street Journal* and *New York Times* quote the price at which gold is brought and sold in New York every business day; selling gold here takes about as much advance preparation as selling shares of IBM. Moreover, the majority of the gold under the venture that defendants destroyed would have gone to Groves in Minnesota.)

Upon the record of El Cid's and Groves' preparations to go forward with the mining venture, which was before the District Court and is summarized in the Statement of the Case, above, we find it incomprehensible that the District Court could hold as a matter of law that all El Cid and Groves had was "a vague and undocumented hope" of bringing millions of dollars and more of gold into this country. The Court of Appeals for the District of Columbia Circuit held on rather similar facts that a trial was required on the issue of preparedness to go forward, in *Neuman v. Vidal*, 710 F.2d 856, 858-860 (D.C. Cir. 1983). Totally convincing, we should think, on the issues of intent and preparedness — see *Neuman* at 858 and the cases there cited — are the facts that but for the conspiracy, El Cid and Groves would have mined the Bolgol together, and after defendants drove Groves away from El Cid, Groves did in fact mine other property in Bolivia.

The Court of Appeals seems to have disposed of El Cid's antitrust claim and all its ramifications upon its observation that

El Cid did not have the $25,000 "token down payment" due to Gaensel on July 25, 1975 in its own pocket and allegedly could not raise that sum — that latter conclusion flying flatly into the face of the record fact that El Cid raised $52,000 (U.S.) cash by summoning Kilpatrick. A-2-3. These conclusions by the Court of Appeals may be unreported, but we ask that they not pass unnoticed. What the court said, in effect, was: Rich and poor may stand equal before the bar of justice except that to assert a large Sherman Act claim, you have to start with $25,000.

The Sherman Act does not say that. It should not say it. It defeats its purpose to say it. We are not aware of any other court that has said it.

The evidence showed, and the lower courts ignored, that but for the conspiracy, El Cid and Groves were going forward as a joint venture. The preparedness of one *was* the preparedness of the other. Each had what the other needed to mine the Bolgol. The Court of Appeals would obviously not have given the short shift to Groves, with its $3,500,000 and mining experience, that it gave to El Cid; but the fortuitous fact that Groves chose not to sue does not diminish one iota the wrongs done by defendants or the resulting injury to El Cid's business and property or the preparedness of El Cid, but for those wrongs, to go forward with Groves, as Groves was prepared to go forward with El Cid. By clarifying the legal issues raised in this case, this Court can also correct a great injustice.

Point 2

Important Choice of Law Issues Warrant Resolution.

While the reasons for granting certiorari on the choice of law questions are perhaps not so strong as they are on the antitrust issues, it does seem important for this Court to consider them because (a) there is no dispute that applicable law is that of the place having the most significant relationship with the subject matter of the alleged torts (*Nader v. General Motors Corp.*, 25 N.Y.2d 560, 307 N.Y.S.2d 647 (1970)), (b) the published opinion

of the Distict Court appears on its face to have reversed that standard in applying it to the facts at bar, and (c) it is not necessary for this Court to mine the material facts from the arcana of a voluminous record and the forensics of counsel, since they are summarized in a neat little table, 575 F. Supp. 1515-1516, as follows:

New York

conspiracy meetings held; birthplace and seat of control of the conspiracy
negotiations between defendants and Gaensel
citizenship of two defendants (Gulf & Western and Condor Mining, Inc.)
source of financing for defendants' intended mining activities

Bolivia

conspiracy meetings held
improper and harrassing litigation entered into
undue influence on judges attempted
legislation sought
lawyers suborned
real property situated
transfer of real property occurred.

To this summary we would add only that the acts of conspiracy in Bolivia were ordered and paid for by, from, and for New York.

The salient conclusion from this table is that in perpetrating the intentional torts alleged, the principals acted in New York and the agents acted in Bolivia and New York (this is not an action for land title). It is elementary not to regard the acts of the agents as having more significance to the torts or to the injury or to anything else, than the acts of the principals who direct and control them. Where the puppet masters pull the strings has greater significance than where the puppets dance. When the Administration in Washington sent the Marines into Lebanon and Grenada, for better or worse, the world held the Administration

in Washington, not the Marines in Lebanon or Grenada, responsible. The lower courts would presumably have found the greater significance in Lebanon and Grenada because that is where the agents acted and the land was. But New York was the seat of the conspiracy; New York, accordingly, had the most significant relationship with it.

In an apparent effort to avoid the force of this conclusion, the District Court decapitated the conspiracy, at 575 F. Supp. 1517, as follows:

> Plaintiff relies heavily on the allegation that defendant's New York activities spawned the alleged conspiracy. This, however, establishes no more than a significant relationship with a plot which in and of itself is non-actionable.

This conclusion, we submit, is in conflict with the holding of this Court in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) that:

> In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. ". . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole...."

Choice of law standards can quickly become a "quagmire" if order is not imposed upon them. See *O'Rourke v. Eastern Airlines, Inc.*, 730 F.2d 842, 846-851 (2d Cir. 1984). We respectfully suggest that it is important for this Court to impose order here.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the orders herein of the Court of Appeals for the Second Circuit.

Respectfully submitted,

MALCOLM H. BELL
Attorney for Petitioner
Prince's Pine Road
Norwalk, CT 06850
203 866-0147

Dated: Norwalk, Connecticut
October 18, 1985

APPENDIX

APPENDIX A

United States Court of Appeals

for the

Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of June one thousand nine hundred and eighty-five.

Present:

HONORABLE WALTER R. MANSFIELD,
HONORABLE JAMES L. OAKES,
HONORABLE JON O. NEWMAN,

Circuit Judges.

EL CID, LTD.

Plaintiff-Appellant,

—v.—

THE NEW JERSEY ZINC COMPANY, GULF & WESTERN INDUSTRIES, INC., GULF & WESTERN INTERNATIONAL HOLDING COMPANY, GULF & WESTERN (CANADA) LIMITED, WATTS GRIFFIS & MC OUAT, LIMITED, CAMINO GOLD MINES LIMITED, CONDOR MINING, INC., RICHARD W. HOGELAND AND DAVID M. KOOGLER

Defendants-Appellees.

ORDER

El Cid, Ltd. appeals from a judgment of the District Court for the Southern District of New York (Whitman Knapp, Judge) granting defendants-appellees' motion for summary judgment. *See El Cid, Ltd. v. New Jersey Zinc Co.*, 551 F. Supp. 626 (S.D.N.Y. 1982), 575 F. Supp. 1513 (S.D.N.Y. 1983), 588 F. Supp. 125 (S.D.N.Y. 1984). El Cid is a Caymen Islands corporation formed in 1975 in the hope of acquiring gold mining rights in Bolivia. In May 1975 a Bolivian court determined that the rights were owned by Helmut Gaensel, rather than one of the defendants in this case, Condor Mining, Inc. of New York. El Cid contracted with Gaensel to buy the rights for $925,000, with an initial payment of $25,000 required by July 25, 1975. El Cid, lacking funds, sought to interest others in financing the venture, principally S.J. Groves and Sons, a Minneapolis construction and mining company. Ultimately Groves decided not to finance the venture. Gaensel contracted to sell the mining rights to Camino Gold Mines Ltd. of Toronto contingent upon El Cid's default. After El Cid's default Camino also failed to secure needed financing, and the area subject to the mining rights has never been mined by any of the parties to this litigation.

1. Though Judge Knapp may well have been correct in concluding that El Cid failed to present any facts to show an effect on United States interstate or foreign commerce from the alleged actions of the defendants sufficient to predicate antitrust claims, we need not review his ruling since El Cid's antitrust claim fails in any event for lack of any evidence of preparedness to enter the gold mining market, an essential element of a claim of market exclusion. *Hayes v. Solomon*, 597 F.2d 958, 973 (5th Cir. 1979), *cert denied*, 444 U.S. 1078 (1980); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 994 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956, (1978). Even if, as the complaint alleges in rather conclusory fashion, defendants' actions unlawfully impaired El Cid's ability to obtain the major financing needed for the contemplated purchase, the inability to raise even a token down payment of less than three precent of the purchase price defeats any claim of preparedness to enter a business requiring not only nearly one

million dollars to purchase mining rights but also extensive capital investment thereafter to mine the property.

2. Though the federal antitrust claim was properly rejected on motion for summary judgment, the District Court was entitled to exercise its discretion to assert jurisdiction over the pendent state law claims, alleging essentially tortious interference with contractual rights. The Court also properly determined that under New York choice-of-law rules Bolivian law governs the state law claims. *See Nader v. General Motors Corp.*, 25 N.Y.2d 560, 307 N.Y.S.2d 647 (1970).

3. The District Court did not err in concluding that El Cid had failed to present facts raising a triable issue of civil liability under Bolivian law. El Cid does not assert on appeal any claim under the Bolivian Civil Code. It relies on the Bolivian Criminal Code, particularly Article 87, imposing civil liability upon those committing penal violations, and Article 303, proscribing obstruction of "the freedom to work." Defendants' expert on Bolivian law, by affidavit and testimony, represented that plaintiff had shown no conduct violating Bolivian law. Plaintiff's expert testified that restriction or obstruction of freedom to work under Article 303 must involve conduct of sufficient gravity to violate "other articles" of the Bolivian Penal Code. El Cid failed to show any such violation. It relies on evidence suggesting that Groves decided against financing the venture in part because of uncertainties created by litigation initiated in Bolivia by one of the defendants. El Cid claims the litigation was baseless. Whether or not the suit had merit, El Cid has totally failed to show that the bringing of a lawsuit creates a basis for damage liability for violating the Bolivian Criminal Code. Plaintiff's expert acknowledged that he knew of no authority under Bolivian law for such a claim. Article 293 of the Penal Code punishes use of a threat that "alarms or causes fear," but El Cid presented no evidence that Groves or its personnel were alarmed or placed in fear by defendants efforts to win the mining rights for themselves.

4. Judge Knapp was correct in ruling that the disappointed contender that brought this lawsuit had shown no basis for receiving money in the District Court.

The judgment of the District Court is affirmed.

s/Walter R. Mansfield

s/James L. Oakes

s/Jon O. Newman

Circuit Judges.

N.B. *Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.*

(JON)

No. 84 -7723

United States Court of Appeals

for the

Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of July one thousand nine hundred and eighty five.

Present:

HON. WALTER R. MANSFIELD
HON. JAMES L. OAKES
HON. JON. O. NEWMAN

Circuit Judges,

EL CID, LTD.,

Plaintiff-Appellant,

v.

THE NEW JERSEY ZINC COMPANY, GULF & WESTERN INDUSTRIES, INC., GULF & WESTERN INTERNATIONAL HOLDING COMPANY, GULF & WESTERN (CANADA) LIMITED, WATTS GRIFFIS & MC QUAT, LIMITED, CAMINO GOLD MINES LIMITED, CONDOR MINING, INC., RICHARD W. HOGELAND and DAVID M. KOOGLER,

Defendants-Appellees.

A petition for a rehearing having been filed herein by Plaintiff-Appellant EL CID, LTD.,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Elaine B. Goldsmith
Clerk

APPENDIX B

IN THE

United States District Court
Southern District of New York

76 Civ. 1388 (WK)

EL CID, LTD.,

Plaintiff,

—against—

THE NEW JERSEY ZINC COMPANY, GULF & WESTERN INDUSTRIES, INC., GULF & WESTERN INTERNATIONAL HOLDING COMPANY, GULF & WESTERN (CANADA) LIMITED, WATTS, GRIFFIS & MC QUAT, LIMITED, CAMINO GOLD MINES LIMITED, CONFOR MINING, INC., RICHARD W. HOGELAND and DAVID M. KOOGLER,

Defendants.

MEMORANDUM & ORDER

WHITMAN KNAPP, D.J.

After extensive discovery, the so-called Gulf & Western defendants[1] have brought a motion for summary judgment against the antitrust claim of the second amended complaint. For reasons set forth below, it is conditionally granted.[2]

THE ANTITRUST CLAIM

This case involves eight gold mining concessions [the Bolgol Concessions] located in Bolivia's Tipuani Valley. These concessions are owned by defendant Camino Gold Mines Ltd. [Camino], which does not mine them for gold. It is plaintiff's contention that, had the defendants not prevented it by unfair means from obtaining the necessary funds from its American backers, it – and not Camino – would now be the owner of the Bolgol Concessions. Plaintiff, moreover, asserts that it – unlike Camino – would have mined the concessions for gold.

The antitrust claim at issue is based on section 1 of the Sherman Act, 15 U.S.C. §1, and section 73 of the Wilson Tariff Act which extends the antitrust laws to the importation of goods. 15 U.S.C. §8. It alleges that defendants conspired wrongfully to deprive plaintiff of the Bolgol Concessions. This conspiracy is claimed to have affected, among others, the security markets and commerce in mining equipment and machinery. Complaint ¶ 22. In this connection the complaint states at ¶ 25:

> The acts of the defendants have had and will have a substantial impact on trade and commerce among the several States and with foreign nations, *in particular* but without limitation, *trade and commerce in mining equipment and machinery, in gold, and in the securities of such defendants as are publicly held and traded*. The combination, conspiracy and concert of action alleged herein are between and among persons and corporations who, as agents or principals, are engaged or to become engaged in importing gold and other commodities into the United States; and such combination, conspiracy and concert of action are intended to operate in restraint of lawful trade and commerce. (Emphasis supplied).

THE INSTANT MOTION

It is axiomatic that a motion for summary judgment may not be granted unless, after resolving all ambiguities and drawing

all reasonable inferences in favor of the party against whom summary judgment is sought, there remains no material fact genuinely in dispute. *Filli. Moretti Cereali v. Continental Grain Co.* (2d. cir. 1977) 563 F.2d 563, 565; 6 Moore's Federal Practice ¶ 56.23[3] Accordingly, for the purposes of this motion, we will accept as established that defendanst did indeed use unfair means to deprive plaintiff of the Bolgol Concessions and that the alleged conspiracy among defendants was planned and set in motion in the United States. We will focus at the outset on the pivotal question whether — on the assumption that unfair means were used — their "intended effects" had a sufficient impact upon United States commerce to warrant application of the antitrust laws to this extraterritorial dispute. We answer this first question in the negative. Furthermore, we then go on to observe that, after several years of discovery, plaintiff has failed to submit such evidence as would allow a reasonable jury to find defendants' conduct in depriving plaintiff of the Bolgol Concessions to have had an anticompetitive effect.

THE UNITED STATES CONNECTION

Facts

As noted above, the subject of this lawsuit is a gold mining concession located in Bolivia's Tipuani Valley and now owned by defendant Camino — a Canadian corporation.

Plaintiff is a corporation organized in the Cayman Islands, British West Indies, with offices in San Jose, Costa Rica. It is not authorized to do business in any jurisdiction within the United States, and has no office or place of business here. It has, however, provided investment advice to investors in this country, and has had American citizens as stockholders. Plaintiff's Rule 3(g) Statement ¶ 2.[4] Moreover, plaintiff, its predecessors, and stockholders have generally conducted business in U.S. dollars, plaintiff's only checking account (presumably with a foreign bank) is and always has been denominated in U.S. dollars, and plaintiff's two main backers on the Bolgol venture — S.J. Groves & Sons Co. and William J. Kilpatrick — are both American. Plaintiff's Rule 3(g) Statement ¶ 57.

The cast of defendants includes three that are Canadian: Camino (the vehicle of defendants' Bolivian mining ventures), Watts, Griffis & McQuat, Ltd., and Gulf & Western (Canada). The other defendants, however, are American. As stated above, for present purposes, it must be taken as established that the alleged conspiracy to deprive plaintiff ot the Bolgol was planned and set in motion within the United States. Thus, plaintiff avers that defendant Gulf & Western expended some $2,275,000 in interstate and foreign commerce in this connection; that defendants sought financing of approximately $7,000,000 for the project from New York City banks and financiers, obtaining a conditional commitment in 1975; and that defendants purchased and prepared to ship from California to Bolivia a large walking dragline valued at several hundred thousand dollars. Plaintiff's Rule 3(g) Statement ¶ 45, 47, 48.

All parties, moreover, used airlines, telexes, telephones, and other instrumentalities of United States interstate and foreign commerce and communication in their respective efforts to secure the Bolgol. Plaintiff's Rule 3(g) Statement ¶ 51.

As to the effect on United States commerce, plaintiff avers that, had defendants not wrongfully deprived it of the Bolgol, it and its partners would have purchased the bulk of their mining equipment — some several million dollars worth — in the United States. Defendants having failed to go forward with the venture, these purchases were wholly lost to domestic commerce. Moreover, plaintiff offers documents which suggest that even if defendants had gone forward with the project, they would have purchased most of the necessary mining equipment in Canada, not in the United States. Plaintiff's Rule 3(g) Statement ¶ 49-50.

Plainitff further avers that it would have brought into the United States a large portion either of the gold mined from the Bolgol or of the money received for it. Plaintiff's Rule 3(g) Statement ¶ 57. It concedes, however, that defendants would have, likewise, brought into the United States the fruits of the Bolgol had they not "failed to go forward with the project through their

own missteps and fallings-out..." Plaintiff's Rule 3(g) Statement ¶ 56.

Finally, plaintiff states that its ability to conduct business in the United States and elsewhere has been hindred by defendants' actions, which wrongfully deprived it of "cash flow for implementing such operations." Plaintiffs Answer to Interrogatories, No. 15(c).

Discussion

Plaintiff's claim must fail because its impact on United States commerce is insufficient to warrant the application of the antitrust laws. As to this phase of the defendant's motion, Judge Learned Hand established the focus of inquiry with the oft-quoted statement that:

> We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. *United States v. Aluminum Co. of America* (2d. Cir. 1945) 148 F.2d 416, 443.

There has been no want of litigation over the question of what must be shown to establish at least *some* "consequences" within the United States. *Timberlane Lumber Co. v. Bank of America* (9th Cir. 1976) 549 F.2d 597, 608 n.12. *See, generally,* 6 Toulmin's Antitrust Laws §31.7. A recent review of the law led Judge Carter to rule that any demonstrable effect would suffice, so long as it was not *de minimus*. Thus, in *Dominicus Americana Bohio v. Gulf & Western Industries* (S.D.N.Y. 1979) 473 F. Supp. 680 he observed at 687:

> According to the *Alcoa* rule, even wholly foreign conduct may come within the sweep of the antitrust laws if it has a sufficient effect on the interstate or foreign commerce of the United States. Indeed, it is probably not necessary for the effect on foreign commerce to be both substantial and direct as long as it not *de minimus*. (Citations omitted.)

Accepting Judge Carter's formulation of the doctrine, we conclude that any effect in the United States of the alleged conspiracy would be, at most, *de minimus.*[5]

Examination of the cases cited by plaintiff on this issue shows that in each of them the defendants were claimed to have conspired to control or to destroy some specific business activity – either in existence or realistically planned – within the United States, or had cut off the importation into the United States of specifically designated goods.[6] It can readily be seen that these cases lend no support to a claim by a foreign plaintiff who has never imported anything into the United States and only alleges the vaguest and undocumented hope of ever doing so.

The startling thing about the facts and arguments submitted by plaintiff is that, despite the assertion that plaintiff and its predecessors had previously conducted "mining operations in Latin America" and that its president had "engaged in mining for many years", *see* Memorandum in Opposition at 10, 16, there is no suggestion that plaintiff, its president, or its predecessors had ever sold an ounce of gold or any other metal in the United States, or had made any specific plans to do so. All that we are given on this score is the vague and undocumented hope that, but for the conspiracy, many "millions of dollars and perhaps billions in gold and/or the proceeds of gold would have flowed from Bolivia" to the United States. No case cited by the plaintiff – nor the totality of all of them – suggests that the alleged frustration of such a vague hope can be deemed to constitute a recognizable consequence within the United States.

ANTI-COMPETITIVE EFFECT

Facts

Despite the completion of discovery [7], there is not enough here to support a reasonable finding that an antitrust violation has indeed occurred. Very little of substance can be gleaned from the papers submitted in connection with the instant motion as to the anti-competitive effect of defendant's conspiracy.

Defendants state flatly that there is no evidence that their actions did in fact restrain either gold mining or gold production. They further observe that plaintiff is not, and never has been, in either the mining equipment or the securities industries. Memorandum in Support of the Motion for Summary Judgment or Dismissal (hereinafter "Defendant's Memorandum") at 15, 17.

In response plaintiff contends that the relevant product markets include both the gold mining and mining equipment industries and that defendants have failed to focus on the commercial realities of the relevant geographic market – the Tipuani Valley in Bolivia. Plaintiff's Memorandum of Law in Opposition to G&W Defendant's Motion (hereinafter "Plaintiff's Memorandum") at 13. As to the gold mining industry, plaintiff claims that defendants' predatory conduct has barred all in that industry from a competitive chance at the Bolgol – the key concession in the gold-rich Tipuani Valley, *Id.* at 21. Plaintiff further observes that defendants are owners of other concessions in the Tipuani Valley – *e.g.*, the Rosario Concessions. These are currently out of production for all practical purposes, but were exploited by defendant Condor from 1966 to 1971. As set forth by the affidavit of James Bates submitted in support of the instant motion, defendants initially contemplated mining the Bolgol in conjunction with three other groups of concessions in the Tipuani Valley. Plaintiff's Supplemental Memorandum in Opposition at 1-2.

As to the mining equipment industry, plaintiff merely states:

> The conspiracy also turned out to have an adverse effect on the mining equipment industry in that El Cid and its partner would have bought several million dollars worth of equipment, and defendants in fact did not. It should also be noted that the plainly predatory intent of defendants' conduct in this case bolsters the conclusion that their conduct had an anticompetitive effect. Plaintiff's Memorandum at 22 (citations omitted.)

Neither side, however, has provided us with any information about the gold market, the gold mining industry, or the mining equipment industry. In particular, we have no information on how or where gold is sold in Bolivia or worldwide; how far afield mining operators generally look for mining equipment, and what governs its selection; what percentage of world-wide or even national production of gold the Bolgol is capable of supplying; and what percentage of world-wide or other sales of mining equipment an operation of the Bolgol's projected size might reasonably be expected to require.

Discussion

Plaintiff has failed to make out a *prima facie* case of antitrust violation. We discard at the outset the line of cases, based on the First Circuit's opinion in *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.* (1st Cir. 1932) 57 F.2d 96, *cert denied*, 286 U.S. 552,, *later limited by George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.* (1st Cir. 1974) 508 F.2d 547, which hold that a conspiracy to eliminate a competitor by unfair means is *per se* a violation of the Sherman Act. It seems to us the better rule is the one enunciated by the Court in *Northwest Power Products, Inc. v. Omark Industries, Inc.* (5th Cir. 1978) 576 F.2d 83, that such conduct rises to the level of a Sherman Act violation only when it has an anticompetitive effect. *Id.* at 90. *See also Eye Encounter, Ind. v. Contour Art, Ltd.* (E.D.N.Y. 1979) 81 F.R.D. 683, 690; *Mr. Hanger, Inc. v. Rizzuto* (S.D.N.Y. 1975) 410 F. Supp. 1158 (dismissed for lack of jurisdiction); *Vogue Instrument Corp. v. Lem Instruments Corp.* (S.D.N.Y. 1966) 40 F.R.D. 497 (summary judgment denied). Thus, in sustaining a grant of summary judgment for a defendant who had concededly conspired to eliminate a competitor by unfair means, the *Norhtwest Power* Court observed:

> [A]bsent some market impact comparable to that which would be forbidden by the law of mergers, the interests protected by the antitrust laws never arise. 576 F.2d at 89.

Compare Whitten, supra, 508 F.2d 547, 567, n.31 (where there is no potential for an actual market effect there can be no liability even for conduct that would otherwise be a *per se* violation of the Sherman Act Section 1).

The difficulty with plaintiff's position in this regard is its failure to define the relevant geographic market. *See Coniglio v. Highwood Services, Inc.* (2d Cir. 1974) 495 F.2d 1286, 1292 ("before there can be a conclusion as to whether there has been...a contract in restraint of trade, a determination must be made as to what [is] the relevant...market") (citing cases). Clearly the relevant product is gold. The plaintiff has suggested nothing to overcome what we believe to be the universally recognized fact that the market for gold is world-wide.[8] Although, as noted, neither party has furnished us with any information about the size of the international gold market, defendants' potential market share is obviously minimal. Therefore, it is difficult to conceive how anything defendants may have done or may plan to do with the Bolgol Concessions – from shutting them down entirely to combining their operation with that of other mines in the Tipuani Valley – could have any noticeable effect on the world-wide market for gold.[9]

Plaintiff seeks to circumvent this difficulty by focussing on the resources of the Tipuani Valley as viewed from the perspective of a gold mining concern. The gold miner, however, is nothing more nor less than a seller of gold on the world market. As Judge Weinfeld aptly observed in *United States v. Bethlehem Steel Corp.* (S.D.N.Y. 1958) 168 F. Supp. 576, 592:

> Any definition of line of commerce which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful.

Put another way, plaintiff – in urging us to consider the effect of the alleged conspiracy on the gold mining industry in the Tipuani Valley - would have us focus on the effect on *competitors* rather than on competition. It is abundantly clear, however, that the Sherman Act protects competition not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. (1977)*

429 U.S. 477, 488: *Jarmatt Truck Leasing Corp. v. Brooklyn Pie Co.* (S.D.N.Y. 1981) 525 F. Supp. 749, 750; *Bustop Shelters, Inc. v. Convenience & Safety Corp.* (S.D.N.Y. 1981) 521 F. Supp. 989, 997; *Clarke v. Amerada Hess Corp.* (S.D.N.Y. 1980) 500 F. Supp. 1067, 1074.

We regard as frivolous plaintiff's suggestion that we should consider the effect on the mining equipment industry. The avowed object of defendants' conspiracy was to secure ownership of the Bolgol; any effect it may have had on the mining equipment industry was accordingly fortuitous.[10] Furthermore, it is sheer speculation whether the shift in ownership of the Bolgol from plaintiff to defendants had any effect on the amount of mining equipment purchased, on the source thereof, or generally on competitive conditions in the market for mining equipment.[11]

CONDITIONS FOR GRANTING SUMMARY JUDGMENT

On the facts before us it seems that defendants' motion for summary judgment as to the antitrust claim should be granted. However, plaintiff strongly argues that it might ill serve judicial economy to grant the instant motion and then be faced with a trial of plaintiff's remaining claims — which would require proof of many of the same facts involved in the antitrust claim. In this connection it will be recalled that defendants have already indicated an intent to move for summary judgment on plaintiff's other claims, but that we had ruled that permission for such further motion would be withheld until we should determine whether the instant motion was viable. Accordingly, we shall hold in abeyance entry of judgment dismissing the antitrust claim and direct that defendant serve any further motions for summary judgment on or before the 12th day of Januray, 1983. In the event no further motion is made, or having

been made is denied, we shall hear argument addressed to the specific question of whether partial summary judgment dismissal of the antitrust claim would enhance or impair judicial economy.

SO ORDERED.

Dated: New York, New York
November 30, 1982

WHITMAN KNAPP, U.S.D.J.

FOOTNOTES

[1] The New Jersey Zinc Company, Gulf & Western Industries, Inc., Gulf & Western International Holding Company, Gulf & Western (Canada) Limited, Richard W. Hogelan, and David Koogler.

[2] Since early 1978 the parties have conducted extensive discovery under the supervision of a Magistrate. In September of 1981 the Magistrate recommended that the Gulf & Western defendants be allowed to make the present motion. The motion was briefed and oral argument was held. Before we could rule, however, this action was stayed pending the outcome of unrelated litigation in another court among the holders of plaintiff's outstanding shares concerning the ownership of the corporate plaintiff. That matter has been resolved and the stay in this case has, accordingly, been lifted. Thus, the motion is now ripe for decision.

[3] We are aware, of course, that "summary proceedings in antitrust litigation are disfavored", *Poller v. Columbia Broadcasting System, Inc.* (1962) 368 U.S. 464, but "they are not to be read out of the antitrust laws." *Reading Ind. v. Kennecott Copper Corp.* (2d. Cir. 1980) 631 F.2d 10, 13, n.6.

[4] A Rule 3(g) Statement is a "short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried", or as to which the party in opposition contends there are indeed triable issues. *See* Local Civil Rule 3(g) (formerly 9 (g)). Plaintiff's Rule 3(g) Statement refers to certain of its "principals" as being United States citizens. We interpret the term "principals" to mean holders of the outstanding shares of plaintiff's stock.

[5] The *Alcoa* rule — also known as the "intended effects" test, *see Conservation Council of Western Australia v. Alcoa* (W.D.Pa. 1981) 518 F. Supp. 270, 275; *Dominicus Americana Bohio v. Gulf & Western, supra,* 473 F. Supp. at 687 — is the law in this Circuit. However, the rule has not remained unchanged since the mid 1940s when Judge Hand penned that

well-known passage. As Judge Carter himself stated in *Dominicus*, "the effects test alone is inadequate, because it fails to take into account potential problems of international comity." *Id.* A commentator recently thus summarized the legal trend:

> ...American courts...based their decisions to apply American antitrust law to foreign restraints exclusively on the effect of such restraints on United States foreign commerce. Their central concern was to draw the line between restraints that Congress intended to reach and restraints it did not intend to reach...
>
> This attitude has recently given way to an awareness...that courts should weigh foreign regulatory interests...when deciding whether to give extraterritorial effect to American antitrust law. Note, *Foreign Sovereign Compulsion in American Antitrust Law*. 33 Stanford L. Rev. 131, 132-33 (1980) (footnotes omitted).

Accordingly, at least two Circuits — the Third in *Mannington Mills v. Congoleum Corp.* (3d Cir. 1979) 595 F.2d 1287, and the Ninth in *Timberlane Lumber Co. v. Bank of America, supra*, 549 F.2d 597 — have applied the "intended effects" test only "as the first step in a two-step process...in determining whether to assert extraterritorial jurisdiction pursuant to the Sherman Act. ***If such jurisdiction is proper [under the *Alcoa* rule] the court should then use a balancing test that takes into account various foreign relations impact factors in order to determine whether the exercise of that jurisdiction is appropriate." *Conservation Council of Western Australia v. Alcoa, supra*, 518 F. Supp. at 275. *See also Industrial Inv. Development Corp. v. Mitsui & Co.* (5th Cir. 1982) 671 F.2d 876, 884 n.7. In light of our ruling that plaintiff has failed under the "old" *Alcoa* test, we have no occasion to speculate whether our Circuit would follow the trend and thus modify the *Alcoa* rule in accordance with the teachings of *Timberlane* or *Mannington Mills*. *Cf. Dominicus Americana, supra*, 473 F. Supp. at 687-88.

So far as we are aware, the collection of cases cited by plaintiff includes practically all regularly cited decisions on the extraterritorial application of antitrust legislation. We here briefly refer to each of the cases plaintiff has cited. In *United States v. Sisal Sales Corp.* (1927) 274 U.S. 268, among the allegations of the government's complaint were that the domestic commerce of the United States had an annual requirement of two hundred fifty to three hundred million pounds of sisal, all of which the defendants conspired to control; and that in the course of the conspiracy the defendants foreclosed mortgages on, and tock title to, four hundred thousand bales of fiber actualy stored within the United States. *Id.* at 272. In *United States v. National Lead Co.* (1947) 332 U.S. 319, *affirming, United States v. National Lead Co.* (S.D.N.Y. 1945) 63 F. Supp. 513, the government's complaint alleged, among other things, that the importation of titanium pigments was essential to a forty-million dollar domestic manufacturing industry. *Id.* at 517, and that no "titanium pigments entered the United States except with the consent of " one of the conspirators. *Id.* at 522. In *Continental Ore Co. v. Union Carbide* (1962) 370 U.S. 690, the Suprem Court remanded for a new trial, overturning the Ninth Circuit's decision to grant a directed verdict for defendants who had been charged with violating Sections 1 and 2 of the Sherman Act. "The complaint stated that [in the relevant period] the defendants produced over 99% of all ferrovanadium and over 90% of all vanadium oxide [the relevant markets] produced in the United States and that during the same period the defendants sold over 99% of the ferrovanadium and vanadium oxide sold in this country." *Id.* at 693-94 (footnote omitted). It was held that the trial court had erred in rejecting plaintiff's offer to prove that they had been excluded from the Canadian market by a wholly owned subsidiary of one of the defendants "allegedly operating...for the purpose of carrying out the overall conspiracy to restrain and monopolize the vanadium industry." *Id.* at 703. Such offer of proof was ruled relevant evidence as to the allegations of domestic misconduct, but there is no suggestion that the Canadian events – standing alone – would be cognizable under the antitrust laws. *Pfizer, Inc. v. India*

(1978) 434 U.S. 308, merely established that a foreign government is a "person" within the meaning of §4 of the Clayton Act, and has no bearing on the question before us. In *Timberlane Lumber Co. v. Bank of America, supra,* 549 F.2d 597, it was alleged that plaintiff was an Oregon partnership principally involved in the purchase and distribution of lumber at wholesale within the United States and in its importation into the United States for sale and use. *Id.* at 603. *Yentsch v. Texaco, Inc.* (2d Cir. 1980) 630 F.2d 46, dealt with an alleged conspiracy in violation of §1 of the Sherman Act whereby a domestic oil company sought to control the prices changed by its American retailers. In *Industrial Investment Development Corp. v. Mitsui & Co.* (5th Cir. 1982) 671 F.2d 876, the Court of Appeals reversed an order granting summary judgment prior to discovery where it had been alleged that an American company engaged in importing lumber into the United States had conspired to prevent another American company from competing with it. In *Joseph Muller Corp. v. Societe Anonyme de Gerance* (2d Cir. 1971) 451 F.2d 727, "the trade and commerce in the commodity involved originated in the United States and was to be shipped from it to other countries." Id. *at* 729. *In Sanib Corp. v. United Fruit Co.* (S.D.N.Y. 1955) 135 F. Supp. 764, the District Court declined to dismiss as insufficient on its face a complaint by a United States citizen who alleged that a business he had been conductin in New York City had been destroyed by the alleged conspiracy. *Todhunter-Mitchell & Co. v. Anheuser-Busch Inc.* (E.D.Pa. 1974) 383 F. Supp. 586, involved imposition of territorial restraint on distributors of beer in, among other places, Miami and New Orleans. In *Dominicus Americana Bohio v. Gulf & Western, supra,* 473 F. Supp. 680, Judge Carter denied summary judgment prior to discovery where plaintiffs, some of whom were American corporations, claimed to have been prevented from soliciting American citizens to travel from the United States to the Dominican Republic. *Id.* at 688, and further claimed that the use of American transportation facilities had been restricted by the conspiracy. *Id.* at 685. *National Bank*

of Canada v. Interbank Card Ass'n. (S.D.N.Y. 1980) 507 F. Supp. 1113, had to do with a conspiracy to control the use of credit cards which had effects on, among other things, "the continuous use of Master Charge cards in the United States and Canada by cardholders who cross the border, [and] on the clearing activities of the various United States banks in the Interbank system..." Id. at 1120-21.

[7] Plaintiff asserts that certain interrogatories are still outstanding, but specifically disclaims any contention that discovery should not be deemed complete for purposes of this motion. Plaintiff's Memorandum of Law in Opposition to G&W Defendants' Motion at 8.

[8] For these purposes, we join plaintiff in rejecting defendants' contention that Bolivian gold can be sold only to the Bolivian government.

[9] In a different context the Supreme Court observed, "in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price." *Apex Hosiery Co. v. Leader* (1940) 310 U.S. 469, 500. Certainly, we have been given no information which would suggest that control over the Bolgol Concessions by defendants rather than by plaintiff would have any effect on the world-wide price of gold, nor how such control would "suppress or even destroy competition" *Chicago Board of Trade v. United States* (1918) 246 U.S. 231, 238; *Apex Hosiery, supra*, 310 U.S. at 501; *E.J. Delaney Corp. v. Bonne Bell, Inc.* (10th Cir. 1975) 525 F.2d 296, 302, *cert denied* (1976) 425 U.S. 907.

[10] Plaintiff points out that, as things turned out, disputes among the defendants prevented them from exploiting the Bolgol once they had acquired it. Defendants' failure in this regard, however, is clearly independent of the claimed anti-competitive thrust of the conspiracy alleged. *Cf. Schwimmer v. Sony Corp. of America* (2d Cir. 1980) 637 F.2d 41, 48 (*quoting Contreras v. Grower Shipper Ass'n.* (N.D.Cal. 1971) [1971] Trade Cas. ¶ 73,592 *aff'd per curiam*, (9th Cir. 1973) 484 F.2d 1346, *cert denied*, (1974) 415 U.S. 932).

[11] Plaintiff's standing to sue on such an injury is altogether questionable. *See Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.* (2d. Cir. 1971) 454 F.2d 1292, 1295; *Reading Ind. v. Kennecott Copper Corp.* (2d Cir. 1980) 631 F.2d 10, 12-13; *Schwimmer v. Sony Corp. of America* (2d Cir. 1980) 637 F.2d 41, 46-47. *But cr. Reiter v. Sonotone Corp.* (1979) 442 U.S. 330; *Blue Shield of Virginia v. McCready* (1982) ____ U.S. ____, 102 S. Ct. 2540, 50 L.W. 4723.